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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-179

COTTONWOOD MALL SHOPPING CENTER, INC.,
A Utah Corporation,

Petitioner,

vs.

UTAH POWER AND LIGHT COMPANY,
a corporation,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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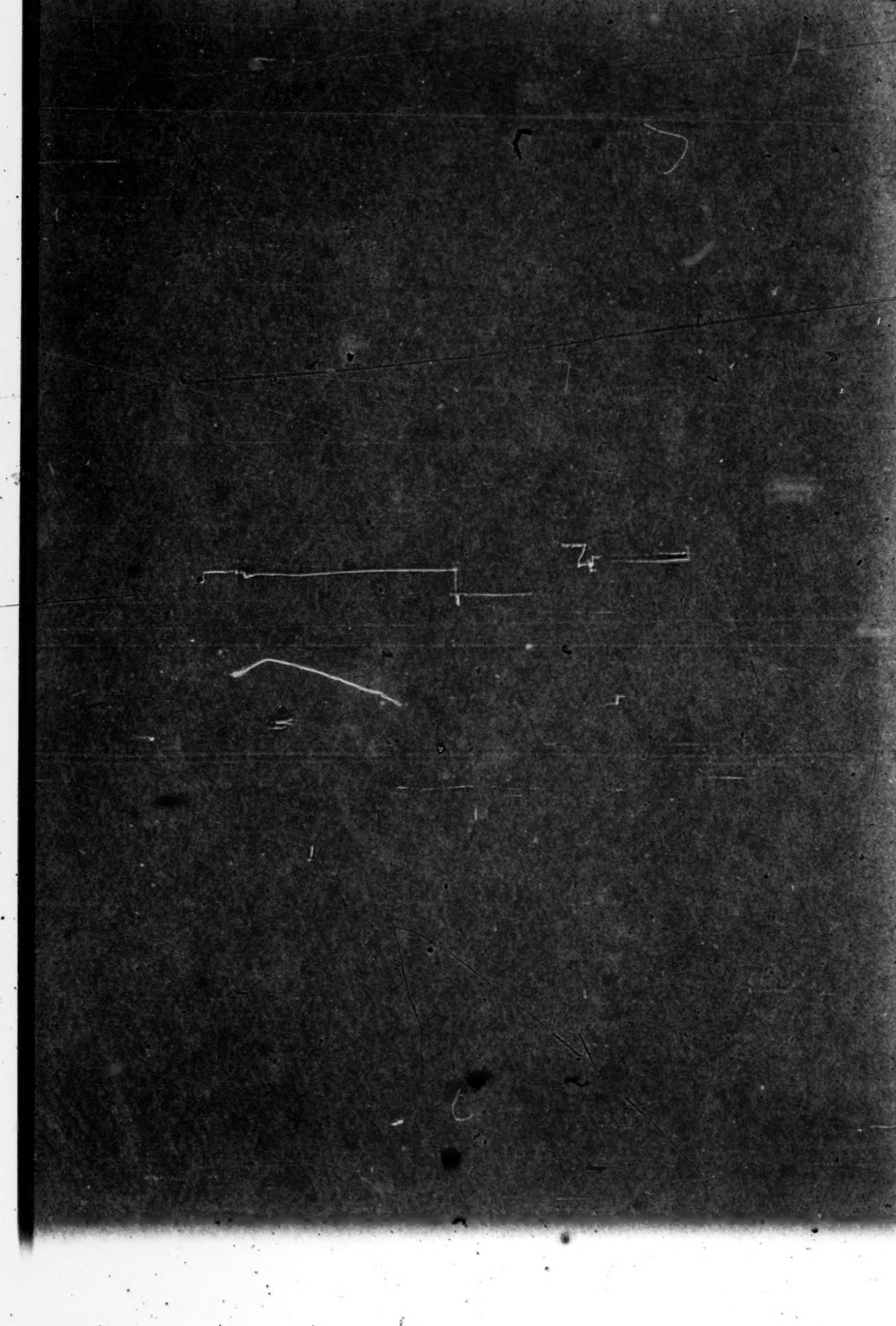

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UTAH POWER AND LIGHT COMPANY,
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Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit filed on the 12th day of March, 1971, and which became final on the 10th day of May, 1971, upon the denial of the petition for rehearing.

OPINIONS DELIVERED IN THE COURTS BELOW

The United States District Court in and for the State of Utah, Central Division, entered a summary judgment in favor of the respondent and against the petitioner dismissing petitioner's action. Said summary judgment was evi-

denced by findings of fact and conclusions of law dated July 11, 1969 and a decree dated October 23, 1968 and entered as of July 11, 1969. Copies of these documents are appended hereto as Appendix A. No opinion was written by the district court.

The opinion and judgment of the United States Circuit Court of Appeals, Tenth Circuit was filed on March 12, 1971, and is reported in 440 F.2d 36, and a copy of said opinion is appended hereto as Appendix B. The Petition for Rehearing was denied May 10, 1971, a copy of which order is appended hereto as Appendix C.

JURISDICTION

The Petitioner seeks to have reviewed the judgment of the United States Circuit Court of Appeals, Tenth Circuit rendered on March 12, 1971. On March 24, 1971, said court granted an extension of time to April 10, 1971, for filing a petition for rehearing. On April 7, 1971, the said court entered an Order granting a further extension of time to April 25, 1971, to file a petition for rehearing. On April 22, 1971, your petitioner filed its Petition for Rehearing before said court. The United States Court of Appeals, Tenth Circuit on the 10th day of May, 1971, entered its order denying the Petition for Rehearing. This action was based upon a violation of the Anti-Trust laws of the United States, 15 U.S.C.A. Sections 1, 2, 15, and 26. A copy of these orders and entries are appended hereto as Appendix C.

STATUTORY PROVISION BELIEVED TO CONFER ON THIS COURT JURISDICTION TO REVIEW THE

JUDGMENT OR DECREE IN QUESTION BY WRIT OF CERTIORARI.

The applicable statute is Title 28 U.S.C.A., Section 1254, subdivision (1), which provides as follows:

> "Cases in the court of appeals may be received by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree ***"

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Tenth Circuit erred in deciding an important state question in a way in conflict with applicable state law in holding that petitioners plan of operation did not come within the exceptions to the definition of "electrical corporation", in the Utah statute and in holding, therefore, it was necessary for petitioner to obtain a Certificate of Convenience and Necessity before it could generate and distribute electrical services in the Cottonwood Mall to its tenants in competition with respondent.

2. Whether the Unted States Court of Appeals for the Tenth Circuit erred in deciding an important state question in a way in conflict with applicable state law in holding that the petitioner, a private corporation, was subject to public service commission jurisdiction and regulation in violation of the Fourteenth Amendment of the Constitution of the United States and Article I, Sections 7 and 22 of the Utah Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THIS CASE INVOLVES

This case involves the construction of Sections 54-4-25 (1), 54-2-1 (20), and 54-2-1 (30), Utah Code Annotated 1953, (1969 Pocket Supplement), the texts of which are appended hereto in Appendix D.

The Constitutional provisions herein involved are the Fourteenth Amendment of the Constitution of the United States and Article I, Sections 7 and 22 of the Constitution of the State of Utah, the texts of which are appended hereto in Appendix E.

STATEMENT OF CASE

This is an action under the anti-trust laws of the United States, Title 15 U.S.C.A. Sections 1, 2, 15, and 26, wherein it was alleged in the first cause of action of the second amended complaint that the petitioner was the operator and owner of a shopping center known as the Cottonwood Mall; that petitioner had substantially completed the construction of an electrical power plant to produce and distribute through private property alone, i.e., property not dedicated to a public use, electrical services, heat and air conditioning, solely for petitioner's own use and the use of its tenants who are located and do business within the confines of petitioner's shopping center. It was further alleged that the plant would cost when completed, approximately $1,500,000.00. It is further alleged that the respondent was a public utility which supplied approximately 95% of all electrical service and power distributed and sold within the State of Utah, and that the respondent had a monopoly on said business in Utah; and that it had maintained and attempted to maintain

its monopoly on said business by discouraging petitioner from operating said plant and in furtherance thereof entered into a contract with J. C. Penney Company to purchase all of its electrical service requirements from the respondent for a period of ten years and that said contract for such length of time had no honest industrial purpose but was for the purpose of eliminating competition and for closing the relevant market to petitioner. It was further alleged that the respondent carried on a campaign in contacting petitioner's tenants and falsely representing to them that petitioner's electrical service would cost more than respondent's, would not be reliable, and that petitioner's electrical power services would be interrupted and would not be available when needed; that the operation of petitioner's power plant would cause excessive vibration and noise and would adversely affect them in the conduct of their business.

All this, it was alleged, was done to eliminate petitioner as a competitor in the electrical power service business.

The second cause of action alleged that after petitioner had entered into a business relationship with J. C. Penney for the taking of electrical services, the respondent entered into a contract with J. C. Penney to furnish said services, thereby maliciously interferring with said business relationship.

The respondent made a motion to dismiss the complaint on the grounds that it failed to state a claim upon which relief could be granted. Affidavits and depositions were submitted to the Court and the Court treated the motion to dismiss as a motion for summary judgment and after argument the trial court granted the motion.

While the motion to dismiss the second amended complaint specified that petitioner did not possess a certificate of convenience and necessity, it is interesting to note that respondent did not raise this defense itself, but it was the trial court who suggested it during the course of one of the arguments prior to the filing of this motion to dismiss.

The petitioner contended that it came within the exception to the term "electrical corporation" as contained in the Utah statute Section 54-2-1 (20).

If petitioner, in its contemplated operation, comes within this exception, there would be no need for a certificate of convenience and necessity and the two causes of action set forth in the second amended complaint could properly be maintained.

The above cited Utah statute defined an "electrical corporation" as being one furnishing electrical power for public service or to its consumers or members for domestic, commercial or industrial use and then makes the following exception: "except where electricity is generated or distributed by the producer through private property alone, i.e., property not dedicated to a public use, solely for his own use, or the use of his tenants *** and not for sale to others."

The language of this statute we believe is clear and concise and the opinion by the Circuit Court has emasculated its effectiveness. Under the reasoning of the Circuit Court no person could ever come within the exception set forth in the statute.

The Circuit Court by failing to give this statute its ordinary and simple construction has decided an important

state question in a way in conflict with the plain provisions of ths statute.

The documents and depositions considered by the trial court established the following, to wit: Petitioner owns and operates a shopping center known as the Cottonwood Mall. This shopping center consists of a complex of stores and buildings surrounding a mall or promenade used by the tenants of the buildings as a common facility. There is a common roof over the stores and the mall and promenade. Petitioner owns title to all of the property on said mall as well as the parking area surrounding the Cottonwood Mall building. The stores, buildings and offices in said shopping center are leased by petitioner to tenants under written leases with the exception of the Eldredge Furniture Company building. There are approximately 70 tenants occupying the buildings, stores, and offices including merchants and professional people. The leases provide that the lessees lease a particular area of the shopping center "together with the use with other lessees of said shopping center, of the parking area and the malls within the shopping center." The leases provide that the merchant shall share in the expense of lighting the parking lot and exterior of the building, for the painting of automobile parking stalls and sweeping and cleaning the parking area including the removal of snow and ice and the maintenance of green areas of the shopping center including shrubs, trees, lawn, flowers and other plantings. The mall and parking area are owned and maintained by petitioner for the benefit of its tenants.

The Eldredge Furniture Company occupies a building and store space which is owned by petitioner. The furniture company is purchasing the building and store area from the

petitioner and it subleases a portion of said area to two merchants. In the affidavit of Sidney Horman, president of the petitioner, it appears that petitioner does not intend to furnish electrical power to the furniture company or its sublessees or to anyone else who is not a tenant of petitioner.

An association of the merchants of the Cottonwood Mall has been organized as a nonprofit corporation for the purpose of satisfying and aiding the promotion of business at the mall, and to assist in making a determination of the activities which should be conducted in the shopping center and parking area. The board of directors of this association consists of persons elected by the merchants and of Mr. Sidney M. Horman, president of petitioner corporation. All of the activities held at the mall must have the approval of the board of directors of the association and of Mr. Horman. All of the activities permitted have for their ultimate function the promotion of traffic and business at the Cottonwood Mall for the merchants who conduct their business there.

A few dances have been held at times when the stores were not open but the dances were given only with the permission of the board of directors and petitioner and were limited exclusively to the members of the organizations to which permission was given to hold the dance. These activities were allowed for the purpose of promoting good will for the Cottonwood Mall and its tenants.

Many other activities are carried on at the Mall but all of them, including the dances, have for their object the building of more traffic to and through the shopping center

and, hence, creating the opportunity for more business for the merchants at the mall.

Various promotions are conducted at the mall which, hopefully, bring more and new business to the merchants. These promotions include auto shows, traveling circus, sidewalk sales, moonlight sales, foreign car shows, garden shows, flower shows, etc. As indicated, all of these have for their purpose increasing the business of the merchants. Permission from the board of directors and from petitioner was necessary for these groups to make their displays and to put on these shows.

Security measures were taken by petitioner and the merchants association to see to it that persons without the necessary authority did not make displays or use the Cottonwood Mall or the parking area.

In reliance upon the plain meaning of the foregoing exception, the petitioner at a cost of some $1,500,000.00 constructed a building and placed therein a total energy plant consisting of five engines and five generators for the purpose of generating electricity for the use of petitioner and its tenants in the Cottonwood Mall. The building is located just south of the shopping center and the entire building and plant are located on the private property owned by petitioner. Ducts and wires have been run underground to the shopping center, all on private property owned by petitioner. Transformers have been installed in the shopping center and electrical wiring can be extended from these to the stores and offices of the tenants of petitioner. Heat recovery equipment has been installed in the plant to capture the waste heat from engines, to furnish steam to heat and

air conditioning to cool the common facilities of the mall and the buildings and spaces occupied by petitioner's tenants.

Petitioner intends to furnish electrical power only to itself and its tenants in the Cottonwood Mall Shopping Center and it does not intend to furnish electrical power to any other person than a tenant.

Petitioner intends to include the charges for electrical power, heating and air conditioning in the monthly rental rates of the tenants. The buildings, stores, malls, parking lot, plant and the land on which they stand and the land and on which the electrical wires, ducts and equipment are placed are private property owned by petitioner and have not been dedicated to a public use.

POINT I.

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ERRED IN DECIDING AN IMPORTANT STATE QUESTION IN A WAY IN CONFLICT WITH APPLICABLE STATE LAW IN HOLDING THAT PETITIONER'S PLAN OF OPERATION DID NOT COME WITHIN THE EXCEPTIONS TO THE DEFINITION OF "ELECTRICAL CORPORATION", IN THE UTAH STATUTE AND IN HOLDING, THEREFORE, IT WAS NECESSARY FOR PETITIONER TO OBTAIN A CERTIFICATE OF CONVENIENCE AND NECESSITY BEFORE IT COULD GENERATE AND DISTRIBUTE ELECTRICAL SERVICES IN THE COTTONWOOD MALL TO ITS TENANTS IN COMPETITION WITH RESPONDENT.

To paraphrase the opinion of the Circuit Court, it zeroed in on the requirement that the electricity must be

generated or distributed by the producer solely for his own use or the use of his tenants. The Circuit Court then decided there are two factors which defeat the application of the exception in the statute in this case. The first was that Eldredge Furniture Company and its sublessees and customers would have the use of this electricity and next that the people who came to the mall as customers would also have the use of this electricity and they would not be tenants and that even some people would come and not buy anything and they would have the use of this electrical distribution.

So far as Eldredge is concerned, the affidavit of Sidney M. Horman, should lay that at rest. The petitioner does not intend to furnish any person with electricity who is not a tenant and specifically mentioned Eldredge. In taking this view the Circuit Court entirely closed its eyes to the purpose and only reason for the existence of the total energy plant. It was constructed solely for the purpose of furnishing this electricity to the tenants in the Cottonwood Mall. This electricity would be used for lighting the stores, the parking lot and the common facilities. Without the tenants there would be absolutely no reason for the existence of this plant. The electricity could only be used for petitioner's own purposes and for the purposes of the tenants.

The same thing can be said of the customers who came to the mall and the persons who came to dance and to the various shows and attractions that were put on at the mall. These people took advantage of these facilities only because they were of use to the tenants in furtherance of their business.

If this reasoning of the Circuit Court is followed to its logical conclusion, there would be no way that any one could come within this exception.

First let us take the example of a single dwelling house that has in it a power plant or generator to generate electricity. If anyone other than the owner comes in the house while the lights are on, under the Circuit Court ruling, this generation of electricity would not be for the sole use of the owner. It would make no difference whether this person was an invitee or a trespasser. His use of the light produced by the electricity would eliminate the right of the owner of this dwelling house to have his own power plant.

Next let us take the example of the apartment house, of which there is at least one in Utah. The apartment house has installed a power plant to light the halls, the apartments, the outside, and the parking lot. It would just be impossible to confine the use of this electricity to the tenants in the sense used by the Circuit Court. The only purpose of this power plant is for the convenience of the tenants and any friends or relatives or business acquaintances who might come to the apartment. The very fact that they do come, would eliminate the right of this apartment house to operate its own electrical generating plant without a certificate of convenience and necessity and the regulation thereof by the Public Service Commission of the State of Utah.

The Circuit Court said that someone might come to the mall who did not buy and cited this as an example of the use of the electricity by others than the tenants or the customers. In the apartment situation, if someone came to the apartment because of making a mistake as to the address

and used the light to see the number of the apartment, it would eliminate the right of the apartment house owner to generate his own electricity without regulation.

These simple examples emphasize the absurdity of the holding and reasoning of the Circuit Court's opinion in this case.

As we have already pointed out, this opinion has emasculated the Utah statute in so far as it makes an exception to the generation and distribution of electricity through private property alone, solely for the use of the producer or for the use of his tenants.

We have only addressed ourselves to the one element set forth in the exception and relied upon by the Circuit Court as the basis of its decision.

The three elements necessary to qualify under the exception in the above cited statute are as follows:

(1) That the electricity be generated and distributed through private property alone, i.e., property not dedicated to public use.

(2) The generation and distribution by the producer must be solely for his own use or the use of his tenants.

(3) That the electricity must not be for sale to others.

Obviously, from the statement of facts, this property is private property upon which this electricity is generated and distributed and it has not been dedicated to public use. This property is the same as the property of any store where members of the public are invited to come and do business

and certainly no one would say that a store is not private property. A combination of stores does not make this mall other than private property. The merchants association and petitioner have a security force, which attempts to keep unauthorized persons out of the mall. It is private property in the true sense of the word and not dedicated to public use.

On the third element, the affidavits state that the only sale of electric energy will be to tenants and no one else.

We submit that the Circuit Court started off on the wrong foot in considering the attitude of the Utah courts and the Utah law toward public regulation. The Circuit Court did not consider that in the case of *Garkane Power Company v. Public Service Commission of Utah,* 98 Utah 466, 100 P.2d 571, 132 A.L.R. 490 (1940) the court ruled against public regulation. The court held in that case that an association that solicited membership from the public was not subject to regulations so long as it only sold electricity to members of the association so solicited. This certainly does not look as though the Utah law looks kindly on public regulation.

The corner stone of the Circuit Court's opinion is its assertion that though encouragement of competition is usually a desirable goal, the situation is otherwise in the public utility field. The extent to which the Circuit Court has pursued this untenable line of reasoning in order to sustain its position is best exemplified by the following statement from its opinion:

> "This means that in construing these statutes — which of course expressly cover the physical operational activities of Cottonwood — we must give a liberal reading to provisions subjecting the activity to regulation while simultaneously giving a more narrow scope to the exception."

We think that the shallow consideration of this case by the Circuit Court is exposed by its flippant language that it had no Utah lamp posts to light its "Erie" way. We think this shows a lack of consideration of the merits of this case.

Other cases have held in similar fact situations, but with different statutes, the operation of large complexes, such as petitioner's, are not subject to public regulation. See *City of Sun Prairie v. The Public Service Commission of Wisconsin,* 37 Wis. 2d 96, 154 N.W. 2d 360 (1967), *Cawker v. Meyer* 147 Wis. 320, 123 N.W. 127 (1911), *Drexelbrook Associates v. Pennsylvania Public Utility Commission,* 418 Pa. 430, 212 A. 2d 237, (1965), *Story v. Richardson,* 186 Cal. 162, 198 Pac. 1057, 18 A.L.R. 750 (1921), *Jonas V. Swetland Co.,* 119 Ohio St. 12, 162 N.E. (1928)

We submit that the Circuit Court has decided an important question involving substantive state law in a manner which directly conflicts with the express language of a state statute wherein it failed and refused to recognize the stubborn fact that petitioner's operation, being clearly a private operation for his own use and that of his tenants, placed him within the statutory exception to the definition of "Electrical corporation" and thus rendered him *not* subject to the state regulatory requirement of obtaining a certificate of convenience and necessity.

POINT II.

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ERRED IN DECIDING AN IMPORTANT STATE QUESTION IN A WAY IN CONFLICT WITH APPLICABLE STATE LAW IN HOLDING THAT THE PETITIONER, A PRIVATE CORPORATION, WAS SUBJECT TO PUBLIC SERVICE COMMISSION JURISDICTION AND REGULATION IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTIONS 7 AND 22 OF THE UTAH CONSTITUTION.

The petitioner is a private corporation. It owns a complex of stores and facilities for a shopping center and proposes to furnish electricity to a selected few individuals and corporations. These would all be tenants.

The Circuit Court, contrary to the holding in two Utah cases, held that this corporation would be subject to public regulation. The holding violates the Fourteenth Amendment to the United States Constitution and Article I, Section 7 of the Constitution of the State of Utah.

In *State ex rel Public Utilities Commission of Utah v. Nelson,* 65 Utah 437, 238 Pac. 237 (1925), the Utah Supreme Court held that a private corporation could not be subjected to public regulation by mere legislative fiat or edict. The language used in that case is very clear and concise. That court stated:

> "No one may successfully contend that it is competent for the Legislature to regulate and control in such respect a mere private business or to declare a

> private business to be public service or a public utility. In other words, the state may not, by mere legislative fiat or edict or by regulating orders of a commission, convert mere private contracts or a mere private business into a public utility or make its owner a common carrier. [Citations omitted.] So, if the business or concern is not public service, where the public has not a legal right to the use of it, where the business or operation is not open to an indefinite public, it is not subject to the jurisdiction or regulation of the commission . . ."

This language and holding was reaffirmed in *Medic-Call Inc. v. Public Service Commission,* 24 Utah 2d. 273, 470 P.2d 258, (1970). In that case the Court quoted the foregoing language from the Nelson case and reaffirmed the principle that private corporations are not subject to public regulation.

The Circuit Court relegated the two Utah cases to a foot note and gave no force or effect to these important rulings of the Utah Supreme Court.

This last case was decided during the time that this case was pending on appeal and was called to the attention of the Circuit Court by petitioner.

In the case of *Producers Transportation Company vs. Railroad Commission of California,* 251 U.S. 228 (1919), this court stated:

> "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the state could not, by mere legislative fiat or by any regulating order of a commission, con-

> vert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment . . ."

The general text statements agree with the foregoing cases. In 43 Am. Jr., 571, Public Utilities and Services, Section 2, it is stated:

> "As its name indicates, the term 'public utility' implies a public use and service to the public; and indeed, the principal determinative characteristic of a public utility is that of service to, or readiness to serve, an indefinite public (or portion of the public as such) which has a legal right to demand and receive its services or commodities. The term precludes the idea of service which is private in its nature and is not to be obtained by the public,"

A state does not have the power to call a private business a public utility. The rule is stated in 43 Am. Jr., 574, Public Utilities and Services, Section 5, as follows:

> "The legislature cannot, by its mere declaration, make something a public utility which is not in fact such; and a private business, operated under private contracts with selected customers and not devoted to a public use cannot, by legislative fiat or by order of a public service commission, be declared a public utility, since that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment to the Federal Constitution."

This statement of the rule is upheld in the following cases from the Supreme Court of the United States: ***Michigan Public Utilities Commission v. Duke,*** 266 U.S. 570

(1925); *Frost v. Railroad Commission,* 271 U.S. 583 (1926). In this latter case the court stated:

> "That consistently with the due process clause of the Fourteenth Amendment, a private carrier cannot be converted against his will into a common carrier by mere legislative command, is a rule not open to doubt and is not brought into question here".

The Supreme Court not only cited the *Duke* case but also the case of *State v. Nelson,* heretofore cited from the State of Utah.

We submit that the Circuit Court has decided an important state question in a way in conflict with the applicable state law.

CONCLUSION

In this case, the Utah statute clearly provides for an exception to public regulation in the event a landlord desires to generate and distribute electricity to his tenants. The Circuit Court refused to follow this language in this case and emasculated the exception.

The Circuit Court also refused to follow two very definite holdings by the Supreme Court of Utah that a private corporation cannot be subjected to public regulation by legislative fiat.

We submit that the questions raised in this petition come within the guidelines of Rule 19 of the Supreme Court Rules wherein it is stated:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will

be granted only where there are special and important reasons thereof. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

* * * *

(b) Where a court of appeals * * * has decided an important state or territorial question in a way in conflict with applicable state or territorial law ***"

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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